IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Nos. 452, 453, 454.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR AND PETITIONER,

vs.

COHEN.

SAME *vs.* HILL.

SAME *vs.* SEARS, EXECUTRIX, &C.

Supplemental Brief of Defendant in Error, Filed by Leave of Court.

I.

THE DEFENSE OF ESTOPPEL, WAIVER, OR ABANDONMENT CANNOT PREVAIL AGAINST THE BENEFICIARIES.

There is no such defense pleaded in the Cohen case.

It is not claimed that Mrs. Hill and the Hill children, beneficiaries, made any statement or did anything that estops the children from maintaining the suit. In the Hill

case the children, ever since the death of their mother, have been and are the real parties in interest. Prior to the death of Mrs. Hill she, and at all times the children, had the right to pay the premiums at any time before default. Ever since the issuance of the policy it has been their contract and not Mr. Hill's. We have shown in our principal brief that under the decisions of the highest court of New York the premiums were not due until thirty days after the service of the statutory notice. There is no claim made that Mrs. Hill and the children did not have the right to pay the premiums; nor did any of them at any time state that they could not or would not pay them. Then, so far as they are concerned, the policy was never forfeited, nor were they ever placed in default. If the alleged agreement of Mr. Hill and the insurance company is good, or if his statement amounts to an estoppel, then the contract was ended at once at the time the alleged agreement or the estoppel took place, and the beneficiaries had no opportunity to pay thereafter, whereas the statute gave them at all times a minimum of 30 days in which to pay. Suppose Mrs. Hill had assigned the contract to secure a debt (leaving out for the purpose of the suggestion the minor heirs of Mrs. Hill), then under the statute the notice must have been served on the assignee. Mrs. Hill was the only party who could assign the policy. It is needless to say in such a case that any declaration or statement that Mr. Hill might make thereafter could not bind Mrs. Hill or the assignee, because each would have the right to pay the premium before default; nor could any declaration of the assignee as to the payment of the premium or the waiver of notice bind Mrs. Hill, though he would be the party upon whom such notice must be served. Mrs. Hill would still have the right to pay the premium; yet her right to pay the premium after assignment was no greater than her right to pay the premium before the assignment, and the declaration of the assignee would no

more bind Mrs. Hill after the assignment than the declaration of Mr. Hill before the assignment. Our contention along this line is fully supported by all of the authorities. The case of Pingrey against the National Life Insurance Company, decided by the supreme court of Massachusetts, 144 Mass., 381, fully supports our contention. In that case the court said:

"There appears to have been a full understanding between him (the assured) and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact it was made payable to her, and this was done with the intention of giving her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might, indeed, afterwards fail to pay the annual premiums. This, however, does not prevent it from being a good trust. 'An unrevoked trust is valid, even though there is an express power of revocation' (Stone *vs.* Hachett, 12 Gray, 227). In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give him an implied power of revocation. His mother herself might continue the payment of the premium. Moreover, by the terms of the policy, after payment of two annual premiums, it would not lapse, and certain valuable rights would still exist under it. Under the circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority."

To the same effect is Bacon on Insurance, vol. 1, section 292, which cites the above case with approval. The supreme court of Mississippi, in the case of Granger Insurance Company against Brown, 57 Miss., 308, 315, sustains the rule in this language:

"The insured in such a case is not a party to the record, has no interest in the policy, and, if he is to be considered the agent of the beneficiary in procuring it, his agency

ceases with its issuance, so that there is no legal ground upon which his statements can be received."

Mr. Justice Brewer, in the opinion delivered by him in the supreme court of Kansas, Washington Insurance Company *vs.* Haney, 10 Kansas, 395, 403, uses this language:

"The party insured is not a party to the record, and therefore the declarations are not admissible on that ground. She is not a party in interest, as the whole benefit and interest insured to the assured. She is not an agent and authorized to speak for him. Nor does she come within any other rule by which her declarations can be received against him."

This point has also been decided by the court of appeals of New York. In that case the policy by its terms became lapsed, and subsequently thereto the husband took out another policy, payable to a different beneficiary. The company defended on the ground that the original beneficiary had no standing in the court, because the original policy had become lapsed by its terms and her rights thereunder were thus ended; but the court says:

"It is not quite true that a failure of the wife to pay the premiums from year to year as they become due will work this result. The statute, unless waived in writing (the court should have said in writing, *in red ink*, on the face of the policy; see chapter 347, Laws of New York, 1879) on the face of the policy, provides that after the lapse of three years the reserve value of the policy, computed according to certain principles, is to be taken as a single premium of life insurance, at the published rates of the company, at the time the policy was issued, and must be applied either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance of that amount at the age of the insured at the time of lapse, or to the purchase upon the same life, at the same age, paid-up insurance payable at the same time, and under the same conditions, except as to payment of premiums, as the original policy (chapter 347, Laws

1879). *And no policy can be declared or treated as lapsed or forfeited until* 30 *days after notice to the policy-holder.*"

Stokes *vs.* Ammerman, 121 N. Y., 337, on p. 323.

A case also from the court of appeals of New York stated this proposition in the following language:

"His was the life insured, but the contract was not with him except as trustee for his children, and as representing them. He took upon himself this office and duty with the full knowledge and assent of the company on the one hand, and the beneficiaries on the other. Every premium paid by him continued to be an act as trustee and agent for the children, and he could not shake off that character and duties without their consent, except in one way. He might omit or refuse to pay a maturing premium, and so suffer the policy to lapse; but the children were at liberty to pay it, though he should refuse, and if they did, the contract would remain valid as at first, and suffer no injury or destruction from his refusal to pay, or to further act as his children's trustee. These children thus had a vested interest in the policy, increasing in value yearly with every payment of additional premium. That interest was measured and represented by its surrender value, which was never the property of John Lindemann in any other sense than as the trust property of the children created by his act as trustee. He could not deal with it in contravention of their rights, especially with one fully apprised of those rights, and of his position and duty as trustee." * * *

"Assuming that by the policy John Lindemann was trustee for the children, it is insisted that the trust was revocable at the option of the trustee and was so far executory as to be capable of revocation; but I think it is a mistake to assume that the trust was wholly executory. It had been to a large extent executed. Every payment of premiums for 15 years had steadily added to the value of the policy as the property of the beneficiaries. The day of final payment grew nearer and the burden of premiums decreased steadily in number. Each payment made added to the surrender value and fully executed the gift to the extent of that value. What the insured had done for the benefit of the assured he could not undo without their consent, nor take from them

what was already theirs and destroy the trust so far as executed."

Garner *vs.* Germania Life Ins. Co., 110 N. Y., 266; 18 N. E., 131, 132.

The following cases fully support us in our claim (Cohen brief, page 6):

Frank *vs.* Hume, 128 U. S., 206, 207.
Glanz *vs.* Gloeckler, 104 Ill., 573.
Gould *vs.* Emerson, 99 Mass., 155.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Whitehead *vs.* Ins. Co., 123 N. Y., 156.
Ins. Co. *vs.* Smith, 44 Ohio St., 146.
Garner *vs.* Ins. Co., 110 N. Y., 266.
Pilcher *vs.* Ins Co., 33 La., 322.
Pingrey *vs.* National Ins. Co., 144 Mass., 374.
Bayse *vs.* Adams, 81 Ky., 368.
Weisert *vs.* Miehl, *id.*, 336.
Wilmaser *vs.* Continental Life Ins. Co., 86 Iowa, 417.
Allis *vs.* Ware, 28 Minn., 166.
City Savings Bank *vs.* Whittle, 63 N. H., 587.
Hooker *vs.* Sugg, 102 N. C., 115, 120.
Conn. Mut. *vs.* Baldwin, 15 R. I., 106.
Wilburn *vs.* Wilburn, 83 Ind., 55.
Kline *vs.* National Ben. Ass'n, 111 Ind., 462.
Splawn *vs.* Chew, 60 Tex., 532.
Ricker *vs.* Ins. Co., 27 Minn., 193.
Waldron *vs.* Waldron, 76 Ala., 285.
Supreme Lodge *vs.* Schmidt, 98 Ind., 374.
(For fuller discussion of case last cited see Hill brief.)

The law seems to be well settled that the insured cannot, to the prejudice of a beneficiary, surrender (even for value received) a live policy. It is claimed that Hill and Cohen surrendered the policies, but with the claim is coupled the

admission that at the time of the alleged surrender no statutory notice had been mailed. It follows, under the express provisions of the statute and the uniform current of decisions, notably the New York cases, that at the time of the alleged surrender the Hill and Cohen policies were live policies, and no premium was *in default*. Therefore the alleged surrender was ineffectual as to the beneficiaries.

The law seems to be also well settled that the beneficiaries were entitled to pay any premium. The statute gave them thirty days after mailing of notice within which to exercise this right. At the time of the alleged surrender (whenever it may have been) the beneficiaries had thirty days after a notice shou'd thereafter be mailed in which to pay. (As the notice was never mailed, the thirty-day period never commenced to run, whereas if the notice had been mailed immediately upon the alleged surrender, they would have had only thirty days.) It would seem logically to follow that the surrender did not cut off this right of the beneficiaries, nor cut short the time for its exercise, and therefore the policies remained subsisting thereafter and up to the time of the death.

We deny that the answers allege a surrender, and submit that the most that can rightfully be made out of the allegations is an *intention to abandon or surrender*, accompanied by what plaintiff in error claims to be facts of inducement, reliance, and injury, but which, we assert, omits at least two (in the Sears case, three) of these necessary elements of an estoppel. An abandonment or surrender must have the two ingredients, viz., intention to abandon or surrender and the act of abandonment or surrender. In the one case discussed the two—intention and act—are supposed to have been coincident. In the other, the intention is supposed to have existed and been declared at one time, the act never to have taken place, but the insured and beneficiary to be estopped to deny it. Certainly, if an actual surrender

would have been ineffectual against the beneficiaries, the alleged estoppel is.

II.

ESTOPPEL.

Under the act of 1877 the statutory notice might precede or follow the due date. The waiver in the policy is of both or either. These notices can (for brevity) be termed, respectively, *advance* and *subsequent*.

a.

The waiver in the policy is ineffectual as to any future notice *of either kind*.

The Clements case, opinions by Brewer, J., and by this court, cited in main brief, page 37, where see other cases on the point.

b.

After the payment of a premium and before the next due date, a statement of the insured, oral or written, waiving all future notices of either kind would be likewise ineffectual.

c.

Under like circumstances a like waiver of some particular future notice of either kind would be likewise ineffectual.

d.

Under like circumstances a like waiver of the next *advance* notice would therefore be ineffectual.

e.

Under like circumstances a like waiver of the next *subsequent* notice would be ineffectual.

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f.

After the first premium on the Sears policy was passed, the policy was, nevertheless, under the New York statute, a live, subsisting policy, and the insured was not in default. Under such circumstances, would his waiver, oral and written, of the next advance notice be effectual? It is respectfully submitted that the proposition under this head is not different from that under *d*, above. In each case the policy was a subsisting contract and the insured not in default.

g.

Under the state of facts supposed in *f*, the company might give a subsequent notice on account of the passing of the first premium. The non-compliance with the notice would have given the company the right by statute to declare the policy forfeited or lapsed. Could the company use the waiver to accomplish the same result? We say no, and give our reasons in the way of an illustration. Let us suppose that Sears passed the first premium (due date thereof, May 16, 1893), the company not having given the advance notice relative thereto. The company might then have given the subsequent notice. Instead of doing so the company opened correspondence with him, or sent an agent to interview him, with the purpose of persuading him to pay the premium. In answer, he refused to pay; stated that he did not intend to pay that premium; that he did not intend to pay any premium; that he intended to abandon the policy, and "elected to have it terminated." Notwithstanding these statements, the company failed to give the subsequent notice. Let us suppose, further, that Sears died during the year; his executrix sued upon the policy; the company defended on the facts aforesaid, claiming thereby that the policy was lapsed. This would be an attempt on the part of the company to have the policy adjudged to have

lapsed by virtue of the estoppel, claiming to have withheld the notice because of the statement of the insured aforesaid. It is just such attempts that the statute forbids. The statute reads:

"No policy shall be forfeited or declared forfeited *or lapsed* until the expiration of thirty days after the mailing of such notice."

The effect of the plea is that the policy is lapsed, not by the exclusive method provided by the statute, but by a substitute method. In considering this proposition it should be borne in mind that at the time this supposed statement was made (whenever that time was) the policy was a subsisting contract, and the insured had at least thirty days in which to pay, on any one of which days he had a perfect legal and moral right to change his mind and pay, and such change of mind could not have prejudiced the legal rights of the company. It should also be borne in mind that this period was not limited in the supposed case to thirty days, but extended for thirty days after the said subsequent notice or any future advance or subsequent notice should be given. So we think it is clear that if the passed premium had been the first (due date thereof, May 16, 1893) and Sears had died during the year, the defense would be held insufficient. The same result would seem to follow logically if we supposed a case wherein two premiums are passed, or even three, four, or five.

On the argument it was suggested from the bench that perhaps the fact that as many as five premiums were passed would be sufficient showing of the actual abandonment of the policy. We argued then, as we do now, that the facts alleged in the answer in the Sears case did not go so far as to plead the actual accomplishment of the abandonment, but only the declaration of the intention to abandon, followed by a failure to pay for the length of time, as to the length of which time the court must remain in igno-

rance, owing to the indefiniteness of the answer in that respect. If we supposed the length of time to have been the longest possible period, to wit, between four and five years, nevertheless we respectfully submit that the length of this period of inaction cannot rightfully be said to make a sufficient showing to constitute the act of abandonment, but rather to make more certain the intention to abandon. Abandonment, as before stated, must combine the act with the intention. There is no allegation that the policy was surrendered up or canceled. Add to these considerations the fact that it is nowhere alleged that the statements were designed to induce the company to withhold any notice; that there is no allegation that the company was induced by them to withhold any notice: that there is no allegation that the company altered its condition or changed its course of conduct in reliance upon the statement, and the further vital fact that it does not appear from the answer but that the statements may have been made at a time when, if the company had not acted upon them, but had at the earliest possible moment given a notice, the notice itself would have kept the policy alive for the period extending beyond the day of the death of Sears—taking all these things into consideration, the conclusion seems irresistible that the facts do not constitute a defense to the action upon the policy. In this connection the court is asked to notice its opinion in the Mowry case, 96 U. S., 547 (main Brief, p. 71).

The court there said that a declaration of an intended abandonment of an existing right would have the effect of an estoppel "if the party, who by his statements as to his intended abandonment of existing rights, *designedly* induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements or enforce his right against his declared intention of abandonment."

III.

THE ACT OF 1897.

a.

On the question of power of the legislature by a subsequent act to withdraw the previous statutory requirement of notice, we wish to recall the court's attention to the Carter case (110 N. Y.) in its relation to the Rosenplanter case. The circuit court of appeals bases its decision in the Rosenplanter case largely upon the decision of the New York court of appeals in the Carter case, assuming that the New York court had held thereby that such legislation was competent. The constitutional question did not arise in the Carter case, and could not do so, owing to the facts in the case as they appear from the opinion. Carter lived in Georgia and up to the time of the passage of the first anti-forfeiture act had uniformly paid his premiums in Georgia. Upon the passage of the act the company sent him a copy of the act, with the statement indorsed thereon that thereafter the company would send the notice referred to in the statute, and that thereafter the insured must pay his premiums in New York. Here was an adoption by the company, as applicable to the policy, of the New York statute. Acting on the suggestion made in this communication, Carter for a number of years thereafter remitted his premiums to New York, thereby accepting on his part the company's offer to bring the policy under the act.

b.

The entire argument of counsel for plaintiff in error in their supplemental brief upon the question relating to the act of 1897 is based upon the assumption that the legislature by the act of 1897 intended to do away with statutory

notice, past and future, as to all existing policies held by persons having no post-office address in the State of New York, and this assumption involves the further one that the act of 1897 absolutely repeals all provisions as to statutory notice to holders of existing policies having no post-office address in the State of New York.

That the legislature should not be said to have so intended is, we think, very clearly pointed out in our main brief. (In this connection attention of the court is called to the fact that some additional discussion of the act of 1897 is contained in our Cohen brief.) It should be remembered that it is an admitted fact that Sears lived and died in the State of Washington, and it was admitted in the oral argument that Sears had at no time a post-office address in the State of New York, and we claim, with all deference to counsel, that it is most illogical for them to argue that the year limitation periods created by the act of 1897 applied to the Sears policy, and at the same time that the act of 1897 repealed, as to the Sears policy, all previous statutory provisions as to notice.

IV.

In the discussion contained in the supplemental brief of the plaintiff in error under *Point IV*, wherein it is asserted that all questions arising under the act of 1897 are open to discussion and determination in this court, the *right* of this court to consider those questions is alone discussed. In our principal brief and now we argue:

First. That, as a matter of right, the court should not consider them; and,

Second. That if it be otherwise, nevertheless the court, having taken this case by virtue of a discretionary power, should not exercise its discretion for the purpose adjudicat-

ing a point in the case which was not submitted to the circuit court of appeals.

V.

The questions presented in this case were so many, so varied, and so interesting that is was impossible for them to be satisfactorily covered in the oral argument. The brief of the defendant in error is especially full and complete on the question of estoppel, subsequent waiver, and abandonment. We invite attention of the court to the discussion therein of those questions particularly.

Respectfully submitted.

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